STRENGTHENING
INDIAN BAND GOVERNMENT IN CANADA

MINISTER OF INDIAN AND NORTHERN AFFAIRS

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BACKGROUND

Under S. 91(24) of the BNA Act, Canada has the authority to legislate in relation to "Indians and lands reserved for Indians". The main exercise of this authority has been the passage of the Indian Act and the establishment of the Department of Indian Affairs to administer the Act and design and administer programs for Indians.

Under the Act, the Indian people have considered the protection of Indian land and culture of primary importance. While 29% of status Indians now live off-reserve, it is fair to say that many Indians left their reserves because of the lack of economic opportunity and not by preference. The high majority of Indian people have remained on reserves by choice and have strongly resisted assimilation despite continuing poor economic conditions on many reserves and dependency on the Federal Government.

This resistance was made particularly evident in 1969, when the Government proposed a strategy aimed at improving Indian conditions that was based on the integration of Indians into mainstream Canadian society. The idea of the Government proposal was that after a transitional period Indians would assume the rights and obligations of other Canadian citizens and that Federal/Provincial responsibilities would be adjusted to reflect this fact. Indian special status would disappear.

These proposals were decisively rejected by Indian leaders, who stressed the importance of special status and special rights (especially in Indian lands), underlined the importance of continuing Federal responsibility for them and rejected integration. The proposals were withdrawn by the Government.

Since that time, the Government has adopted new policies based on consultations with the Indian people, on acceptance of the notion of special identity for Indians as long as they desired it, and on the desirability of strengthening Band Governments on reserves. These policies included the devolution of administration of DIAND funds to Indian bands (which now administer 49% of the budget of the Indian and Inuit Affairs Program compared to 16% in 1971/72), the adoption in 1973 of the comprehensive claims policy on settling land claims based on the use and occupancy of Canadian lands and the publication of the 1976 Government/Indian Relationships paper which accepted the special Indian identity in Canadian society. These policies culminated in 1982 with the inclusion in the constitution of a clause recognizing the existing aboriginal and treaty rights of Indians and the aboriginal peoples, a strong affirmation of the special rights of aboriginal peoples, and a building block that must be recognized in the development of all future policies in relation to Indians. In 1982 as well the Federal Government reconfirmed its comprehensive claims policy and clearly stated its policy commitment to settle specific claims arising from treaties between Indian people and the Crown.

Indian Band Government Under the Indian Act, 1982

The main purposes of the current Indian Act are to provide for Band Councils and the management and protection of Indian lands and moneys, to define certain Indian rights, such as exemption from taxation in certain circumstances, and to define entitlement to Band membership and to Indian status.

Under the legislation, Band Governments have many of the powers of local Governments under provincial systems (such as zoning, control of domestic animals, provision of local health programs, maintenance of local law and order and definition of minor offences). They also have special rights in relation to the "preservation, protection and management" of fish and game and punishment of trespassers. Bands recognized as advanced have additional local Government powers in relation to taxation, appropriation and the appointment of officials.

There are five practical difficulties with the Bands' present status. First, the exercise of all these powers is subject to various kinds of control by the Minister and/or the Governor in Council. In most instances, the Federal Government's power of discretionary control of bylaws and other powers is not exercised in practice if a band is acting within the law. The fact that it exists, however, complicates the accountability of Band Government and often leads to interminable technical complications to accomplish the simplest act.

Second, land tenure system under the Indian Act is based on the historical view that reserve lands were meant for the exclusive use of Indians and were to be protected for Indians until they could control their lands like anyone else. This protection was for both Bands and individual members of the Band. The Indian Act, therefore, limits the ability of both the Band and individual to deal with the land.

a) The Indian Act, for example, uses an allotment system to allow the Band Council to grant individual members use of part of the reserve. No allotment, however, is officially recognized without Ministerial approval of such allotment. A Band member can sell this allotment to another Band member, but this sale must be approved by the Minister.

   Although a Band member may bequeath his allotment, he can only leave it to another Band member, and such a bequest is not valid until it has been approved by the Minister. Besides the right to sell or devise the allotment to another Band member, or to the Band itself, the Indian Act does not define what other rights go with an allotment. Thus some Bands view the allotment as being similar to a fee simple, while other Bands view it as being less. It is not surprising that Courts are reluctant to deal with allotments because of the Minister's discretion involved, and because of the uncertainty of rights under an

allotment. It is also understandable why the allotment system is not used by the majority of Bands in Canada. Some Bands allot land through custom; others use no regularized system at all.

b) The same limitations imposed on the individual are also imposed on the Band. It cannot mortgage the land, and it cannot lease the land other than through the Minister. In fact, under the Indian Act, an Indian Band does not have the same degree of managerial powers over Indian land as a non-Indian proprietor would have in the private sector.

c) It is not possible to grant Bands full managerial power over reserve lands under the present Indian Act. While the Department is using s.60 and s.53 to give Bands some degree of control over the internal management and management over non-Indian use of surrendered lands, the Minister can only delegate his authority to individuals within the Band to act as his agent. In such cases the Crown still retains the ultimate responsibility and accountability and therefore limitations must be placed on the exercise of the delegation.

Third, the Minister also has trust responsibilities in relation to Band moneys which prevent him from permitting Band Governments to control their own assets and to use them as they would wish for their own development.

Fourth, Band Governments have few legislative powers in social and economic development areas. The Department of Indian Affairs has devolved the administration of many such programs to numerous bands, but has retained the power of program definition.

Fifth, the legal status of Band Governments has been put in question by the courts. It is currently unclear whether Band Governments have legal power to contract with other legal entities.

Indian Band members are currently subject to the by-laws promulgated by their Band councils, to federal laws, and to provincial laws of general application except where they conflict with treaty rights. Since, under the present Band council system, the powers, capacities and responsibilities of Band Councils are limited and poorly defined, Councils often find themselves making decisions with regard to matters over which their jurisdiction is unclear or else very restricted. As a consequence, Band Councils increasingly find themselves coming into jurisdictional conflict with Federal, provincial, and municipal governments. One of the main objectives of any attempt to strengthen Indian Band Government would therefore have to be to clearly define the extent and nature of the powers to be exercised by such Indian Band governments.

Thus, adjustments in law and practice are evidently needed to remove the outdated authority of the Government in relation to the exercise of Band powers and the administration of land and other Band assets, to allow the Band to be accountable to its members for the exercise of its own authority while being generally accountable to the Minister and through him to Parliament for its expenditure of public funds, and to improve the functioning of Indian Band Governments within the Canadian political system generally.

Change is needed to reflect democratic principles. Indian Band Governments have existed from time immemorial and have continued to exist under the Indian Act. Given the provisions of the Indian Act, however, Band Governments are more like administrative arms of the Department of Indian Affairs than they are Governments accountable to Band members. This is a situation that should be changed as soon as possible.

ALTERNATIVES FOR STRENGTHENING INDIAN BAND GOVERNMENT IN CANADA

The following alternatives could provide a new base from which Indian Bands could exercise the equivalent level of political responsibility enjoyed by all other Canadians within their own local communities:

1. Complete revision of the Indian Act

   Given the fact that the current Indian Act is now thirty years old, has not been significantly amended since it was first enacted in 1951, and reflects the thinking and attitudes, as well as the political and social realities, of Canadian society immediately after the end of World War II, such a revision would seem more than timely. The record of attempts during the intervening years to bring about such a revision, however, has shown major shortcomings:

   a) The wide variety of circumstances faced by Indian Bands, with respect to number of band members, location, and material conditions, and the concern on the part of some bands that any change to the current Act will result in a diminution of their special relationship with the Crown, have precluded unanimous agreement on proposed changes.

   b) There has been a lack of consensus as to the nature and pace of change.

   c) Demands have been made that the terms and conditions of existing treaties be fully honoured before any major overhaul of the legislation is attempted.

   d) More recently, Indian leaders have demanded that aboriginal rights be fully clarified and entrenched in any new Canadian Constitution prior to any legislative revisions.

These caveats raised by Indian leaders have resulted in numerous resolutions being passed at Annual General Assemblies staunchly opposing any such Federal government or joint Indian/Federal government initiatives.

On the Federal government side, it is recognized that an overall revision of the Indian Act is indeed a massive and complex undertaking. Even with Indian concurrence and support, and the allocation of major resources, both human and financial, to the process, it is seen as a project requiring a minimum of three years total involvement.

2. Partial revisions of and additions to the Indian Act

This is an approach originally favoured by the former National Indian Brotherhood and the delegates to the Annual General Assembly at Truro, Nova Scotia, in 1975. A resolution was passed calling for:

a) a "phased" approach to revisions to the Indian Act;

b) the principle of optional adoption by Bands of any revised provisions of the Indian Act; and

c) the necessity of consultation with the Indian people by the Federal government before any such revisions are enacted.

Preliminary work was done within this context between the Fall of 1975 and the Spring of 1978, untilizing the joint N.I.B./Cabinet Committee mechanism which was agreed to at the time. Certain items were identified for revisions: surrendered lands, taxation, Indian government, education, and anachronisms within the Act. Some progress was made, such as a reduction in the paternalistic control over Indian money, and some tentative agreement was readied on the subject of surrendered lands. The basic understanding which was left after the talks were broken off in 1977, however, was that the Federal Government should not initiate amendments to the Indian Act until Indian Bands and Associations could all agree on proposed changes. Unfortunately, history has shown no agreement yet on where to start in this process.

3. Development of a series of "subject" Acts affecting Indians

This approach would see the identification of particular areas of legislation in which the affairs of Indian people might be categorized for specific attention. Examples of this would be an Indian Education Act, an Indian Lands Act, an Indian Membership Act, an Indian Financial Administration Act, etc.

This would have the advantage of tackling such issues on a finite and exhaustive basis. It has been pointed out, for instance, that given the complexities of modern education, the total provision for Indian education is contained in nine sections of the current Indian Act, compared with the extensive Acts passed by provinces to cover the same topic.

On the other hand, the interrelationship between most of these topics, both in terms of their internal application to the Indian communities and their external relationships to other levels of government, is viewed as a major disadvantage in attempting to solve the legislative requirements for Indians and Indian communities via this approach. Furthermore, the proposal of Area-Specific Acts leaves unadressed the fact that Indian Governments must first be established in a way which would enable them to receive and exercise the powers which the Area-Specific Acts would provide.

4. Development of a series of regional or Individual Band Indian Acts

Such a development would be one way of tackling the cultural diversity of Indian tribes and their customs and institutions across the country. There is a general tendency for non-Indians to think of "Indians" in universal terms. Indians, however, view themselves as Cree, or Iroquois, Blackfoot or Haida, and know that each of these designations relates to a specific cultural exclusiveness in terms of language, custom, institutions, leadership patterns, etc. As such, regional or Band-Specific Acts devised with these differences in mind, and being applicable to the general territory within which such like Bands are located, would limit the extent of consensus required and would seem to have some validity.

The resources required to develop such legislation, however, would be extemely large and require a considerable amount of Parliament's time. The process would be spread out over a very extensive time frame. The results of such a process, furthermore, would likely serve only to complicate the situation rather than to simplify it. For example, there are elements of commonality among Bands in different regions which might be missed. There is also a possibility that the Federal Government would be accused of a strategy of "Divide and Conquer".

5. Development of companion legislation to the Indian Act which would allow for optional Indian Band government at the community level

While Indian Associations, both national and regional, have generally been opposed to legislative initiatives on the part of the Federal government, individual Bands and smaller regional associations have been urging that the Minister of Indian

Affairs develop the means whereby they, on an optional Band by Band basis, be recognized as having the powers and authority necessary to take over local responsibility for their own social, economic, political and cultural development.

They have expressed very forcefully the view that unless a new legislative base is provided by which they can develop political responsibility for the development of their communities, the inherent restrictions within the Indian Act will continue to hold them in a limbo which will continue to make any local decisions, or agreements between themselves and other parties, legally suspect.

This does not mean that they would be uninterested in or unconcerned about the broader constitutional issues. The Bands who have shown the greatest interest in this alternative legislative development acknowledge that many additional major concerns will still need to be resolved. They feel, however, that this approach will enable them to establish the necessary sense of self-dependence and internal responsibility while these other discussions are in progress, and that such new legislation can be developed without prejudice to the ultimate resolution of major constitutional issues.

The advantages of legislation to Band Government are to be found in the fact that (a) it could meet the expressed needs of a considerable number of Indian Bands; (b) as optional legislation, if would not require consensus support from all Bands; (c) for those Bands which opted to come under such legislation, it could provide the means of establishing the sense of local political responsibility which they have not enjoyed since Confederation and before; and (d) the legislation could be framed with a moderate output of human and financial resources. Subsequent to the resolution of the major issues concerning aboriginal and treaty rights within the broader Constitutional context, revisions to legislation could be made with the advice and assistance of Indian people.

CONCLUSION

However it is to be accomplished, it is clear that the legal and political status of many Indian Bands in Canada must be changed if their governments are to be in a position to help their people realize personal, social and economic goals. The Band governments of such bands as the Sechelt Band and the Alliance Bands in British Columbia, the Sarcee Band in Alberta, and of other Bands in central Canada and the East have repeatedly approached the Minister of Indian Affairs and his Department with demands that they be less constricted in their dealings with their own people or with neighbouring non-Indian communities. In a way which is compatible with the provisions of their treaties or with the special relationships they have with the Federal Government by virtue of Section 91.24 of the B.N.A. Act, these

Indian governments seek to be more responsible for the handling of their own affairs and more accountable to their own electorates than they can be under the current Indian Act. They also seek the authority they require to make on-the-spot decisions which are crucial to their local circumstances, such as decisions respecting economic development opportunities and in social and health matters. The challenge is to respond to the demands and obvious needs of many Band governments in a way which respects the preference of other Band governments to continue their development within the existing legal and political framework, or to await constitutional change. The challenge is to accommodate Band governments which desire and require increased powers of government in a way which is compatible with the democratic principles and values which prevail throughout Canada. The legal and polticial framework within which Indian Bands find themselves must be supportive of their desire to assist their members in realizing their full potential as Indians and Canadian citizens.